No. 13942.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on September 24, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On October 27, 1952, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on November 24, 1952.

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[1]"R." refers to Transcript of Record.

On March 19, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a jury, and on April 6, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 4-6.]

On April 6, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was also entered. [R. pp. 4-6.] Appellant appeals from this judgment. [R. pp. 6-7.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statutes Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sction] . . . shall, upon conviction in any district court

of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

Statement of the Case.

The indictment charges as follows:

"Indictment—No. 22509-CD Criminal [U. S. C., Title 50, App., Section 462—Selective Service Act, 1948].

"The Grand Jury charges:

"Defendant CHARLES SIMON, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 122, said board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O, and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the Armed Forces of the United States of America on July 31, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On October 27, 1953, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On March 19, 1953, the case was called for trial before the Honorable William C. Mathes, United States District Judge, without a jury, and on April 6, 1953, the appellant was found guilty as charged in the Indictment. [R. pp. 4-6.]

On April 6, 1953, appellant was sentenced to imprisonment for a period of four years in a penitentiary. [R. pp. 6-7.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence. [App. Spec. of Error 1—App. Br. p. 12.][2]

B. The District Court erred in convicting the appellant and entering a judgment of guilt against him. [App. Spec. of Error—App. Br. p. 12.]

C. The District Court erred in denying the Motion for New Trial. [App. Spec. of Error 3—App. Br. p. 12.]

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Error"; "App. Br." refers to "Appellant's Brief."

IV.

Statement of the Facts.

On August 18, 1949, Charles Simon registered under the Selective Service System with Local Board No. 122, Long Beach, California. [F. 1-2.][3]

On September 25, 1950, the appellant filed with Local Board No. 122, SSS Form 100, Classification Questionnaire. [F. 4-11.] In Series VI he stated he was a minister of religion but that he did not serve regularly as a minister of Jehovah's Witnesses. [F. 6.] He stated he was a full-time student at Compton Junion College, majoring in printing and art. [F. 9.] The appellant signed Series XIV and thus informed Local Board 122 that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms. [F. 10.]

SSS Form 150, Special Form for Conscientious Objector, was furnished to the appellant and he completed this form and filed it with the Local Board on October 10, 1950. The appellant claimed to be conscientiously opposed to participation in war in any form, by reason of his religious training and belief. [F. 18-24.]

On October 26, 1950, the appellant was classified in Class I-A, and was mailed notice thereof on the same date.

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[3]Numbers preceded by "F." appearing herein within brackets refer to pages of Appellant's Draft Board File, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom of the photostatic copies which identifies the page in the Draft Board file.

On October 31, 1950, the appellant requested a personal appearance before the board and was granted such personal appearance on December 13, 1950. [F. 35-36.]

On December 20, 1950, the appellant filed Notice of Appeal from his classification to the Appeal Board. [F. 40.]

On April 19, 1951, the Appeal Board reviewed the file and determined that the registrant was not entitled to classification in either a class lower than IV-E or in Class IV-E. [F. 49.]

On April 30, 1952, the appellant was classified I-A-O by the Appeal Board, by a vote of 3-0. Form 110, Notice of Classification, was mailed on May 7, 1952, to the appellant.

On July 18, 1952, SSS Form 252, Order to Report for Induction, was mailed to the appellant ordering him to report for induction on July 31, 1952. [F. 58.]

The appellant reported for induction but refused to submit to induction into the Armed Forces of the United States. [F. 62.]

V.

ARGUMENT.

POINT ONE.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class I-A-O and Its Action Was Neither Arbitrary nor Capricious.

The classification of registrants by Local Boards and Appeal Boards is provided by 50 U. S. Code, App., Section 460, which provides in pertinent part:

> ". . .
>
> "(b) The president is authorized—
>
> "(3) to create and establish . . . civilian local boards, civilian appeal boards, . . . Such local boards . . . shall, under the rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. . . ."

The appeal board has jurisdiction, thus, to hear appeals and classify anew.

32 C. F. R., Sec. 1626.26—Decision of Appeal Board—provides:

> "(a) The appeal board shall classify the registrant, giving consideration to the various classes *in the same manner in which the local board gives consideration thereto when it classifies a registrant,* except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.
>
> "(b) Such classification of the registrant shall be *final,* except where an appeal to the President is taken: Provided, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of Part 1625 of this chapter." (Emphasis added.)

The classifications of the local boards and later the appeal boards made in conformity with the regulations are *final* even though erroneous. The question of jurisdiction arises only if there is no basis in fact for the classification.

Estep v. United States, 327 U. S. 114;

Tyrell v. United States, 200 F. 2d 8 (9 Cir.).

The Statute granting the exemption reads as follows:

> "Title 50, App., United States Code, Section 456, Deferments and Exemptions from training and service.
>
> "(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of

the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . ."

It is necessary, however, for a person who claims exemption from combatant or non-combatant training, to have his claim sustained by his local, or thereafter his appeal board.

Thus, such a registrant must satisfy the Selective Service Board as to the validity of his claim for exemption in the following particulars:

(1) He must be conscienciously opposed to war in any form;

(2) This opposition must be by reason of the registrant's religious belief, and

(3) His religious training;

(4) In addition the character of the registrant, and

(5) The good faith and sincerity of his objections are judged.

If the registrant, or his claim for exemption, fails to satisfy the Selective Service Board in any one of the following particulars, there is a basis in fact for the classification of the Board in refusing the exemption, in whole or in part.

Selective Service Regulations, Section 1622.11 [32 C. F. R. 1622.11] provides:

"§1622.11—Class I-A-O—*Conscientious Objector Available for non-combatant military service only.*

"(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of

religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

"(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.' "

Selective Service Regulations, Section 1622.14 [32 C. R. F. 1622.14] provides:

"§1622.14—Class I-O—*Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*

"(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces.

"(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

" 'Religious training and belief in this connection means an individual's belief in relation to a Supreme Being involving duties superior to those arising from

any human relation, but does not include essentially political, sociological, or philosophical views or a purely personal moral code.' "

These sections of the Selective Service Regulations define in broad terms the qualifications necessary for classification as a conscientious objector in classification I-A-O and I-O. The application of these descriptions to particular registrants is a duty imposed upon the Local Boards and later the Appeal Boards. The Boards are left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final in the absence of arbitrary or capricious conduct on the part of the Board so classifying a registrant.

Estep v. United States, supra.

To aid the Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objectors, in addition to SSS Form 100, Classification Questionnaire. The questions and answers given thereto by a registrant are the basis of a classification by a Board within the broad terms of Selective Service Regulations, Sections 1622.11 and 1622.14. The burden is upon the registrant to maintain and prove his claim within these categories.

United States v. Schoebel, 201 F. 2d 31;
Davis v. United States, 203 F. 2d 853.

The appellant contends that the action of the Appeal Board is arbitrary, capricious and without basis in fact. A reading of the Appellant's Selective Service file indicates the contrary. [F. 53-54.] The Congress of the United States has taken great pains to investigate the conscientious objection claims that have not been sustained by the Local Boards. To this end, Section 6(j) of the Universal Military Training and Service Act [Title 50, App., United States Code, Section 456(j)] requires an inquiry and opportunity for the claimant to be heard in regard to his conscientious objection claims, over and above the personal appearance that the Local Board will grant to its registrants (as was done here). [F. 36.]

It is noted that the appellant's conscientious objections were sustained as to combatant service, though not as to non-combatant military service. Thus, there was a recognition by the Appeal Board of his conscientious objection claims. Furthermore, it is difficult for the hearing officer to be able to put down on paper the reasons for his recommendation to the Appeal Board, because conscientious objection is a state of mind, an intangible item. The hearing officer has an opportunity to hear and observe the registrant, to see the Selective Service files, and allow the appellant to submit new information, written or verbal, to substantiate his claim. It appears that this was done in compliance with the rules and regulations. [R. pp. 29-30.]

POINT TWO.

The Classifications of the Local Board Made in Conformity With the Regulations Are Final if There Is a Basis in Fact for the Decision of the Local Board.

The appellant had opportunity to place a summary of his basis for a claim as a conscientious objector in his SSS Form 150, Form for Conscientious Objector, and the appellant did take advantage of this opportunity. Furthermore, the appellant may at any time mail information in the Local Board and direct that it be placed in his file. The facts appear that appellant took advantage of this opportunity also. [F. 12-17, 25-31.] It appears that the appellant was given a reasonable opportunity to admit new information and the Local Board did look at some of the information before it. The regulations do not require that the Local Draft board consider unlimited unrelated information, nor need it allow the registrant unlimited time in his appearance before them. The appropriate section is Title 32, Code of Regulations, Section 1624.2(b):

> "At any such appearance the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked, or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or if oral, shall be summarized in writing, and in either event, shall be placed in the regis-

trant's file. The information furnished should be as concise as possible under the circumstances. A member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Furthermore, the law presumes that the Local Board has done its duty, *Koch v. United States,* 150 F. 2d 762, and procedural errors or irregularities which do not result in prejudice to the registrant are to be disregarded.

POINT THREE.

The Trial Court Committed No Error When It Refused to Receive Into Evidence the Federal Bureau of Investigation Reports and Exclude Same From Inspection and Use by Appellant in This Case.

At the trial the court made an in camera examination of the investigative reports of the Federal Bureau of Investigation, and marked them "Defendant's Ex. B." The Trial Court held that the materiality of the report is slight and that the evidentiary value of the report to the defense is outweighed by the public interest in the preservation of the confidential character of executive communications designated as "confidential" by the executive pursuant to Regulations issued under Section 22 of Title 5, United States Code. [R. pp. 37-38.] It is within the power of the Trial Court to exclude irrelevant, immaterial and incompetent evidence. Furthermore, procedural irregularities or omissions which do not prejudice the defendant (appellant) are to be disregarded.

Martin v. United States, 190 F. 2d 775;
Tyrrell v. United States, supra;
Atkins v. United States, 204 F. 2d 269.

It is submitted that the procedure followed by the Department of Justice in this case was in accord with the leading case in this view, *United States v. Nugent*, 346 U. S. 1, which held that the conscientious objector was not entitled to inspect the investigator's report. [R. pp. 5-6.]

CONCLUSIONS.

The appellant was duly and validly classified by the Appeal Board.

No action of the Local Board was arbitrary or capricious. There was no denial of due process in the classification of the appellant.

There was no error by the District Court in denying the Motion for Acquittal of the defendant.

There was no error by the District Court in entering a judgment of guilt against the defendant.

There was no error by the District Court in denying the Motion for New Trial.

There was no error of law in the rulings of the District Court, and therefore, the conviction should be affirmed.

Respectfully submitted,

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